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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1984

SANDRA MOTELES,
Petitioner,
v.
UNIVERSITY OF PENNSYLVANIA
and
LOCAL 506, UNITED PLANT GUARD
WORKERS OF AMERICA,
Respondents.

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

United States Constitution:

Article III, Section 2, Clause 1. Jurisdiction of Courts:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States; --between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Statutes:

42 U.S.C §2000e-5(f)(1):

If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attor-

ney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation

agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the

Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

EEOC Regulations:

29 C.F.R. §1601.28 (Notice of right to sue: Procedure and authority.):

(a) Issuance of notice of right to sue upon request.

(2) When a person claiming to be aggrieved requests, in writing, that a notice of right to sue be issued, and the charge to

which the request relates is filed against a respondent other than a government, governmental agency or political subdivision, the Commission may issue such notice as described in § 1601.28(e) with copies to all parties, at any time prior to the expiration of 180 days from the date of filing the charge with the Commission; provided, that the District Director, the Area Director, the Program Director, Office of Program Operations or upon delegation, the Director of Systemic Programs, Office of Program Operations or the Directors, Regional Programs, Office of Program Operations has determined that it is probable that the Commission will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge and has attached a written certificate to that effect.

## STATEMENT OF THE CASE

Petitioner asks this Court to grant review in a case where jurisdiction was contested and remains undecided and where the underlying issues have become moot with time.

### Factual Statement

This case arose from the temporary reassignment of Officer Sandra Moteles ("Moteles") to a different work shift. For over a decade, the University of Pennsylvania ("University") has had a policy of requiring that at least one police officer of each sex work each of the three shifts in the Department of Public Safety. This policy stemmed from the concerns of the female members of the University community following a series of rapes in 1973. Based upon the recommendations of many, including University psychologists and law enforcement professionals, the University concluded that female victims

of sexual assault object, because of the intimacy of the crime, to dealing with a male officer immediately following an assault and that the availability of a female officer facilitates the collection of essential law enforcement information which, in turn, contributes demonstrably to the apprehension and successful prosecution of offenders. The University community numbers over 35,000, of whom roughly 45% are women.

Local 506 of the United Plant Guard Workers of America ("Union") represents the University's campus police officers. The University and the Union are parties to a labor contract governing many of the terms and conditions of the officers' employment, including shift selection. Under the contract's modified seniority system, officers may bid for shift assignments in seniority order only if they are otherwise qualified to perform the job.

Until 1982, the natural distribution of men and women across shifts provided the necessary male/female coverage. In May, 1982, the promotion of two female officers left the evening and night shifts without a female officer and the University reassigned two female officers from the day shift. These officers (Moteles was not among them) did not challenge their reassignment as sexually discriminatory but did raise procedural issues under the contract.

As a result of their grievance, the University and the Union agreed that sex was a valid qualification, within the meaning of the seniority clause, for one position on each shift and that, if an officer of the needed sex did not bid onto the shift, the University could reassign the least senior available officer to fill the position.

In March, 1983, the University reassigned Moteles from the day shift to the

evening shift. That reassignment, temporary from the outset, lasted about two weeks and was based upon conditions which have long since disappeared.

Mootness

Moteles seeks only to enjoin the University from transferring her from the day shift. The preliminary injunction granted that relief and returned her to the day shift. Although the Third Circuit vacated the injunction, the University's need to reassign Moteles has disappeared and she continues to work the day shift -- the shift of her choice.

The possibility of the University again having to reassign Moteles to a different shift is remote at best. Since this action began, the University has commissioned four more female officers. Two of these officers presently work the evening shift and one

works the night shift. All are among the least senior employees in the bargaining unit and each is junior to Moteles. Another female officer, also with less seniority, works the day shift. Thus, four of these five officers stand between Moteles and forced reassignment.

Jurisdiction Undecided

Title VII requires that, before a charging party may file an individual action, he or she must first exhaust administrative remedies. 42 U.S.C. § 2000e-5(f)(1) (1976). Moteles requested and received a right-to-sue letter only hours after the EEOC assumed jurisdiction over her charge, before the EEOC made any attempt to investigate or conciliate her claim and before it notified respondents that a charge had been filed. This action followed the same day.

The University and the Union challenged the district court's jurisdiction, arguing that Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1), requires that the EEOC process the charge for 180 days, or otherwise dismiss it, before a right-to-sue letter may issue; and, that, even if Section 706(f)(1) somehow does not mean what it plainly states, the EEOC's complete abdication of its responsibility in this case, and Moteles' complicity in it, stripped the court of jurisdiction.

The district court rejected these contentions as "immaterial" and barred respondents from presenting any evidence to support them (App. 21a). The Third Circuit explicitly found error and remanded to the district court with instructions to consider both of respondents' challenges to its jurisdiction (App. 21a). Significantly, this issue is not raised in the Petition. Thus, there remains

pending a challenge to the fundamental subject matter jurisdiction of the district court -- a challenge which the court of appeals viewed as substantial in a ruling with which Moteles apparently has no quarrel. It is in this posture that Moteles asks this Court to grant certiorari and for which additional reason review is peculiarly inappropriate.

## REASONS FOR NOT GRANTING REVIEW

### I. THE APPEALED DECISION NO LONGER PRESENTS A LIVE CONTROVERSY

In the absence of a live controversy, the constitutional requirement of a "case" or "controversy", see U.S. Const. Art. III, deprives a federal court of jurisdiction. Preiser v. Newkirk, 422 U.S. 395 (1975). An actual controversy must exist "at stages of appellate or certiorari review, and not simply at the date the action is initiated." Roe v. Wade, 410 U.S. 113, 125 (1973). A case, although live at the start, becomes moot when intervening acts destroy the interest of a party to the adjudication, DeFunis v. Odegaard, 416 U.S. 312 (1974), or when circumstances foreclose the court from resolving a "real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would

be upon a hypothetical state of facts." Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 241 (1937).

Because hers is an individual -- not a class -- action, mootness depends solely on Moteles' continued need for the injunctive relief her Complaint seeks.[1] Sosna v. Iowa, 419 U.S. 393, 400 (1975); DeFunis v. Odegaard, 416 U.S. 312, 316-317 (1974) (per curiam); Indiana Employment Security Div. v. Burney, 409 U.S. 540, 541-42 n.2 (1973) (per curiam). With time that need has evaporated. Thus, Moteles seeks only an advisory opinion on the theoretical availability of the BFOQ defense and the standards for preliminary injunctive relief in a Title VII case.

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[1] The Complaint does not present any issue of back pay under Title VII. Moteles earned more on the evening shift than she earned on the day shift.

Moteles' transfer became effective on March 20, 1983. It ceased on April 4 with the district court's order that she return to the day shift. Since then, despite the Third Circuit's decision, Moteles has remained on the day shift. The possibility that the University will again have to transfer her is remote.

On April 6, 1983, the female police officer who was in training at the time Moteles was transferred completed her training and replaced Moteles on the evening shift.[2] Since then, the University has hired five new officers. Three are women. Two have been assigned to the evening shift and the third to the night shift. All are junior to Moteles. Three female officers, in addition

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[2] The parties do not dispute that the University has the right initially to assign a newly hired employee, male or female, to any shift.

to Moteles, work the day shift. At least one has less seniority than Moteles.

For Moteles once again to be subject to reassignment, too many improbable events must converge. The four female officers, junior to Moteles and junior within the bargaining unit, would have to leave at the same time, no woman be hired to replace them, and no more women be hired between now and then. Each of these contingencies is highly unlikely. While some women have been promoted to different positions, the annual attrition rate for female officers is minimal. In the past four years, only one woman has left the force. Moreover, the University steadily has hired more women. Over the past three years, 46% of the new officers hired have been women. Since 1978 the University has hired, on a percentage basis from those eligible candidates, more female officers than male

officers.[3] This record renders it distinctly improbable that the University will not hire any more women or that, should any of the present officers, male or female, resign, the University will not hire at least some women to replace them.[4]

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[3] Petitioner distorts the University's hiring record at page 15 of her Petition. From 1978 through 1982, the University hired 5 of 24 or 20.83% of the eligible female candidates as compared to 16.8% of the eligible male candidates. In 1977 five of the seven officers hired were women and in 1983 three of the five officers hired were women.

[4] It should be noted that the case was not moot at the time the Third Circuit reviewed it. The effect of the preliminary injunction was to foreclose respondents' defense to the merits of the case and expose them to an award of counsel fees with no avenue for review. As this Court observed in Firefighters Local Union No. 1784 v. Stotts, 52 U.S.L.W. 4767 (U.S., June 12, 1984) (Nos. 82-206 and 82-229), a plaintiff "cannot invoke the jurisdiction of a federal court to obtain a favorable [result] and then insulate that ruling from appellate review by claiming that they are no longer interested in the matter . . ." 52 U.S.L.W. at 4770.

(Footnote Continued)

The conditions faced by the University in March 1983 when Moteles was reassigned "were unique, are no longer present, and are unlikely to recur . . ." County of Los Angeles v. Davis, 440 U.S. 625, 632 (1979). See also, SEC v. Medical Committee for Human Rights, 400 U.S. 403, 406 (1972). As this Court noted in Hall v. Beals, 396 U.S. 45, 49 (1969), "speculative contingencies afford no basis for our passing on the substantive issues appellants would have us decide . . . ." See also United States v. SCRAP, 412 U.S. 669, 688-89 (1973).

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(Footnote Continued)
Moreover, at that time, only one woman stood between Moteles and the possibility of reassignment.

II. THIS COURT SHOULD NOT GRANT REVIEW WHERE SUBJECT MATTER JURISDICTION IS CLOUDED BY CHALLENGES NOT YET DECIDED BY THE LOWER COURTS.

In enacting the 1972 amendments to Title VII, Congress made an explicit finding that

> "Administrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases . . .
>
> The sorting out of the complexity surrounding employment discrimination can give rise to enormous expenditure of judicial resources in the already heavily-overburdened Federal district courts . . .
>
> Administrative tribunals are better suited to rapid resolution of such complex issues than are courts. Efficiency and predictability will be enhanced if the necessarily detailed case by case findings of fact and fashioning of remedy is performed by experts in the subject matter."

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971), reprinted in [1972] U.S. Code Cong. & Ad. News 2137, 2146. Section 706(f)(1), which was part of the 1972 amendments, provides:

> "If a charge filed with the Commission . . . is dismissed by the Commission, or

> if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference . . . [from a state agency], whichever is later, the Commission has not filed a civil action under this Section . . ., or . . . entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . ."

42 U.S.C. §2000e-5(f)(1) (1976).

This Court has observed that "a natural reading of §706(f)(1) can lead only to the conclusion that it simply provides that a complainant whose charge is not dismissed or promptly settled or litigated by the EEOC may himself bring a lawsuit, but that he must wait 180 days before doing so." Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 361 (1977) (emphasis added). In this case the EEOC ignored the plain terms of the statute and issued a right-to-sue letter, upon request, within hours of assuming jurisdiction

over the charge. Moteles filed suit the same day.

Respondents cried foul. They argued Moteles' suit was premature because it came before the EEOC had considered the charge for 180 days or otherwise dismissed it on its merits; and, that, even if exhaustion of the full 180-day statutory period was not required, the EEOC's complete abdication of its responsibility and Moteles' thwarting of the administrative process deprived the court of jurisdiction in this case.

The district court dismissed these contentions as "immaterial" (App. 21a). The Third Circuit disagreed, implying that the internal regulation pursuant to which the EEOC apparently issued the right-to-sue letter[5] was invalid or, at the least,

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[5] See 29 C.F.R. §1601.28, set forth at pp. xi-xii, ante.

susceptible to critical review (App. 21a). These issues remain to be considered by the district court.

With this cloud on jurisdiction, petitioner's request for review is premature -- and presumptuous. See e.g., Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327 (1967).

## III. PETITIONER EXAGGERATES THE SIGNIFICANCE OF THE BFOQ ISSUE CONCERNING WHICH SHE SEEKS ONLY AN ADVISORY OPINION.

Petitioner asks this Court to believe that the University "stripped" her of seniority, "locked" her into a job from which she could not escape and jerks around a limited number of women from shift to shift so that it does not have to hire more. Her rhetoric is transparent.

Moteles wrongly presumes that she has a strict seniority right to the shift of her choice. Her labor contract provides only a qualified seniority right. It incorporates the BFOQ defense upon which respondents rely.

The University did not "lock" petitioner into any job. It merely asked that she work a different shift on these limited occasions when the natural distribution of sexes across shifts did not result in the placement on each shift of at least one officer of each

sex, and she was the least senior female. Her reassignment lasted two weeks.

The University has not failed to hire women. It has steadily hired more women and in greater percentages than men.

Petitioner's citation to Firefighters Local Union No. 1784 v. Stotts is equally misleading. Stotts was not a BFOQ case. The tension in Stotts was between race and seniority where the parties had failed to provide for any modified treatment of seniority rights. The issue in this case is not a conflict between Moteles' seniority rights and her sex but whether her sex can legitimately be considered by the University and the Union in establishing those rights. Moteles' discussion of Stotts and its analysis of seniority and innocent parties misses the mark.

In any BFOQ case, some "innocent" party is necessarily affected. Equally "innocent" is the man against whom Moteles concedes the

BFOQ defense could apply. Merely because a woman may be burdened by the defense does not render it void. See, e.g., Nashville Gas Co. v. Satty, 434 U.S. 136, 143 (1977). The "potential conflict of rights [the BFOQ defense involves] transcends the particular alignment of genders." Forts v. Ward, 621 F.2d 1210, 1212 (2d Cir. 1980).

Whether applied to a man or a woman, the critical question in any BFOQ case remains the justification for the sex-conscious policy. That no court has had occasion to apply the BFOQ defense in the context of an employee of the same sex the job demands does not undercut the Third Circuit's decision. Impact on members of the same sex is implicit in all cases which have considered the defense. E.g., Forts v. Ward, 621 F.2d at 1212 ("the challenged discrimination against the male guards is alleged to result in the impairment of employment rights of female

guards. Resolution of such cases requires a careful inquiry as to whether the competing interests can be satisfactorily accommodated before deciding whether one interest must be vindicated to the detriment of the other"); Sutton v. National Distillers Products Co., 445 F. Supp. 1319 (S.D. Ohio 1978), aff'd, 628 F.2d 936 (6th Cir. 1980) (implicit in the Court's decision that the transfer of the female plaintiff did not violate Title VII because she was not of the sex the job demanded was a finding that the resulting sex-conscious transfer of a male employee from his regular shift did not violate his Title VII rights).

That the legality of the BFOQ defense depends upon the job and those served by the job, and not upon the sex of the employee performing the job, is plain from the statute. Section 703(c) provides that, if sex is a BFOQ, an employer may "employ employees

. . . on the basis of sex." 42 U.S.C. §2000e-2(e)(1) (1976). Transferring or refusing to transfer an employee are both encompassed within the meaning of "employ". Any other interpretation offends Congress' intent and artificially denies the BFOQ its plain meaning.

## IV. THIS COURT HAS IMPLICITLY DECIDED THE ISSUE OF IRREPARABLE HARM PETITIONER PRESENTS FOR REVIEW.

### A. The Court of Appeals did not deny petitioner the possibility of proving irreparable harm.

Moteles completely misreads the Third Circuit's holding on irreparable harm. It did not deny her the possibility of proving irreparable harm because she had a companion remedy under Section 301 of the Labor Management Relations Act. It held that where the evidence showed "at most" (App. 24a) that she was suffering the inconvenience of working a different shift, petitioner failed to meet her burden of proving irreparable harm (App. 24a-25a).

The district court cited no facts to support its conclusion that plaintiff's injuries were "irreparable", "of a peculiar nature" and "caused by retaliation visited upon her by University authorities. . . ." (App. 12a-13a). On the contrary, the record

showed that Moteles earned more money on the evening shift, a shift she formerly worked; the Spanish class with which her transfer supposedly conflicted also met on her day off; her "inability" to attend this class ceased by the time the preliminary injunction issued; and, the "retaliation" to which the district court apparently referred was based on a statement made by Moteles for the first time from the witness stand which the district court refused to allow the University the chance to rebut (App. 24a). Under these circumstances, Moteles cannot credibly argue that the Third Circuit lacked the latitude to reverse the district court's finding of irreparable harm as an error of law.

B. The conflict petitioner suggests among the circuits on the issue of irreparable harm does not exist.

The conflict petitioner suggests exists among the circuits on the need to prove irreparable harm in the context of a claim of intentional employment discrimination is of petitioner's invention. This Court has already decided the issue in Sampson v. Murray, 415 U.S. 61 (1974).

Sampson was a wrongful discharge case. The plaintiff alleged that her dismissal caused her to suffer a loss of income and damage to her reputation. Even if proven, this Court concluded, this "showing falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction." Id. at 91-92 (emphasis added).

The Fifth Circuit stands alone in holding that a victim of intentional discrimination is absolved from proving irreparable

harm. Middleton-Keirn v. Stone, 655 F.2d 609 (5th Cir. 1981). This view was soundly rejected by the district court, the Third Circuit and all other circuits which have considered it. E.g., EEOC v. Anchor Hocking Corp., 666 F.2d 1037 (6th Cir. 1981); Ekanem v. Health & Hospital Corp., 589 F.2d 316 (7th Cir. 1978); EEOC v. Pacific Press Publishing Ass'n, 532 F.2d 1182, 1191 (9th Cir. 1976); Gresham v. Chambers, 501 F.2d 687, 691 (2d Cir. 1974). It is also a conflict more apparent than real. Middleton-Keirn ignores this Court's instruction in Sampson v. Murray. It is also an historical anomaly. A hold-over from cases that antedated the adoption of the 1972 amendments to Title VII, see, e.g., Culpepper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir. 1970); United States v. Hayes International Corp., 415 F.2d 1038 (5th Cir. 1969), Middleton-Keirn failed to consider the legislative history to the 1972

amendments which makes clear the need to prove irreparable harm. See generally EEOC v. Anchor Hocking Corp., 666 F.2d at 1041-1042; App. 23a. For these reasons, the issue is not worthy of review.

## CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.


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